

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

CARMEN L. GHULAM and  
MUHAYYONDIM GHULAM

Plaintiffs

v.

DENIS RIORDAN, Director of the  
USCIS Boston District Office, et al

Civil Action No. 05cv30555-MAP

**PLAINTIFFS' OBJECTION TO REPORT AND RECOMMENDATION WITH  
REGARD TO DEFENDANTS' MOTION TO DISMISS**

The Plaintiffs, by their attorneys, ANGELIDES & SOUTH LLP, pursuant to Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, object to the Report and Recommendation with Regard to Defendants' Motion to Dismiss. Said report was issued by United States Magistrate Judge Neiman on August 12, 2005 and received electronically by the Plaintiffs' attorneys on August 16, 2005.

LEGAL BASES FOR OBJECTION

I. The issue of jurisdiction was improperly decided

The Report concluded that the Immigration and Nationality Act ("INA"), the Administrative Procedures Act ("APA"), and the Mandamus Act fail to accord the Plaintiff the necessary jurisdiction. Citing a First Circuit case holding that mandamus is available only when there is "(a) some special risk of irreparable harm, and (b) clear entitlement to the relief requested", the Report argues that the "discretionary acts at issue" in the present case make mandamus inappropriate. *Chronicle Publ'g Co. V. Hantziz*, 902 F.2d 1028, 1031 (1<sup>ST</sup> Cir. 1990). (Report, p.4).

To support this finding in the context of immigration, the Report follows with case cites from the

fifth, seventh, and ninth circuit courts of appeal as well as *Saleh v. Ridge*, (367 F.Supp. 2d 508, 511(S.D.N.Y. 2005). *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5<sup>th</sup> Cir. 1992); *Iddir v. INS*, 301 F.3d 492, 499 (7<sup>th</sup> Cir. 2002); *Nova Stylings, Inc. v. Ladd*, 695 F.2d 1179 (9<sup>th</sup> Cir. 1983).

In its Order Granting Petition for Writ of Mandamus dated June 6, 2005, the U.S. District Court, Southern District of Florida, in *Elkhatib v. Bulter*, held that USCIS has a “non-discretionary duty to process Petitioner’s application within a reasonable period of time”. (Case No. 04-22407-CIV-SEITZ/MCALILEY, p.3). In so finding, the court cited *Yu v. Brown*, 36 F.Supp. 2d 922, 925 (D.N.M. 1999). Both *Elkhatib* and *Yu* present the same jurisdictional issue as the present case: the duty of the Attorney General to adjudicate applications for adjustment of status. Both courts found the duty to be nondiscretionary.

The Report cites *Saleh* for the proposition that the Plaintiffs’ petition is not eligible for mandamus relief. The court in *Saleh* did hold, however, that because the plaintiff’s petition had been pending for five years, the court held that the claim was “not patently without merit” and therefore the court had jurisdiction of the APA claim pursuant to 28 U.S.C. sec. 1331. *Id.* at 512. This basis for jurisdiction in the present case was discounted in the Report because it was found that the Plaintiff failed in his argument that he suffered unreasonable delay. (Report, p.5).

As in the present case, In *Saleh*, there was a five year delay in the adjudication of an adjustment of status application. The court found that such a delay was sufficient to bring the case within the boundaries of an APA claim pursuant of 28 USC 1331. *Id.* The court, however, held in that case that the delay was not unreasonable because of the particular circumstances of the case where the plaintiff’s application was based on asylum and therefore subject to an annual cap. *Id.* at 511.

## II. The issue of unreasonable delay was improperly decided

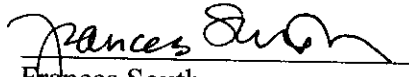
The Report again cites *Saleh* in support of the finding that delay in the adjudication of Plaintiff’s petition has not been unreasonable. (Report, p. 5). As in the *Saleh* case, the Plaintiff’s case has been pending for five years. Unlike the *Saleh* case, however, there is no annual cap because the application is not based on asylum. Therefore, the reasoning of the Report is incorrect.

Further, the court in *Elkhatib*, found four years to be an unreasonable delay for adjudication of an application for adjustment of status under the same circumstances as the present case. *Id.* at 3.

The Plaintiffs have had their fingerprints processed as recently as August 12. Exhibit A. A criminal records check for Massachusetts was completed on June 29, 2005. Exhibit B. For the foregoing reasons the Plaintiff objects to the Report and Recommendation With Regard to Defendants' Motion to Dismiss.

Respectfully submitted  
ANGELIDES & SOUTH LLP  
256 North Pleasant Street  
Amherst, MA 01002  
413 256 1901

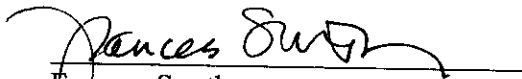
By:

  
Frances South  
BBO # 633168

VERIFICATION

1. I am an attorney admitted to practice before this court.
2. I am a partner in the law firm Angelides & South LLP.

Dated: August 22, 2005  
Amherst, Massachusetts

  
Frances South

CERTIFICATION

This is to certify that a copy of the foregoing was mailed August 22, 2005, certified mail, postage pre-paid to :

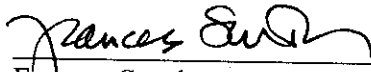
Michael Sullivan, U.S. Attorney's Office

Karen Goodwin, Assistant U.S. Attorney  
Federal Building and Courthouse  
1550 Main Street Room 310  
Springfield, MA 01103

Denis Riordan  
Director of the USCIS Boston Office  
JFK Federal Building, Room 1700  
15 New Sudbury Street  
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Eduardo Aguirre  
Director, USCIS  
20 Massachusetts Ave. NW  
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Secretary of Department of Homeland Security  
1300 Pennsylvania Ave. NW  
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Frances South

1-689\* (Rev. 10-1-97)

**FEDERAL BUREAU OF INVESTIGATION  
Criminal Justice Information Services Division  
CLARKSBURG, W.V. 26306**

**AUG 12 2005 5 636**

**Please note the stamp on the back of the enclosed  
fingerprint card indicating the results of the search of the FBI  
Criminal Justice Information Services Division's files.**

**Enclosure(s)**

**Identification and Investigative  
Services Section**

**FBI/DOJ**

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✓ H.M.D.  
49 KAMUDA ST.  
SPRINGFIELD MA. 01151-1971  
06/24/05 Edward C. McDonnell

✓ GILULAM MUHAYYEDIN

DC000000Z  
CJIS-WV-DO-REQ  
CLARKSBURG, WV

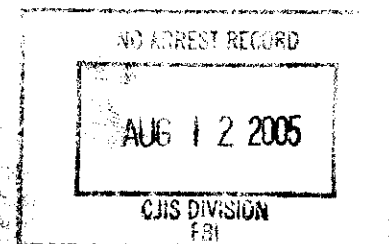
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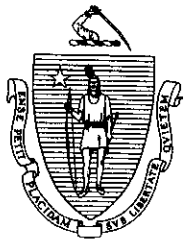
✓ 01 28 72  
M A BIO 170 H2L BLK PK

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IDENTIFICATION CARD  
MASSACHUSETTS  
ID USED MA. DRIVER'S Lic. #  
528714903  
**SPRINGFIELD POLICE DEPT.**  
P. O. BOX 308, SPFLD., MA 01101





Mitt Romney  
Governor

Kerry Healey  
Lieutenant Governor

The Commonwealth of Massachusetts  
Executive Office of Public Safety  
Criminal History Systems Board

200 Arlington Street, Suite 2200  
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TTY Tel: 617-660-4606  
Fax: 617-660-4613  
www.mass.gov/chsb

Edward A. Flynn  
Secretary of Public Safety

Barry J. LaCroix  
Executive Director

To whom it may concern:

A computerized search has been made of the database of the Criminal History Systems Board, which is the repository for criminal records in the Commonwealth of Massachusetts, for GHULAM, MUHAYYODIN, date-of-birth 01/28/72 and have determined that he or she has no adult criminal court appearances.

Signed under the pains and penalties of perjury this Twenty-Ninth day of June, 2005.

*Sean M. Hughes*

Criminal History Systems Board

Suffolk, ss.

County

Then appeared before me the above-named individual and swore the statements made herein to be true to the best of his or her knowledge and belief.

Dated: 06/29/2005

*[Signature]*  
Notary Public

My commission expires

5/5/06

RANDI B. SHEA  
Notary Public  
My Commission Expires  
May 5, 2006

